Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-867

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIE J. HODGES,

Petitioner,

-against-

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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In his reply brief, petitioner (at pages 8-11) raised the issue of the validity of the decision below, on the ground that it was made by an improperly constituted panel. Reference was made to a motion in the case of White v. Department of Transportation, FAA, No. 85-1503, which was then pending in the Court of Appeals for the Federal

Circuit. The Court of Appeals denied the motion on February 7, 1986, (A copy of the Order is annexed as Appendix "A").

The reason given for the denial of the motion was that it did not challenge any action the court has taken against air traffic controllers represented by the attorney who made the motion and thus constituted a request for an advisory opinion.

The refusal of the Court of Appeals to grant the relief requested, i.e. compliance with the statute and the court's own rules relating to the assignment of judges, and its failure, sua sponte, to grant relief for those controllers whose cases had already been decided by improperly constituted panels, means that the only available remedy is by an order of this Court.

Respectfully submitted,

Joan Stern Kiok
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(212) 635-0700

Dated: New York, New York
February 14, 1986

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KARL B. WHITE,

Petitioner for In Banc Review,

Original Motion entitled

CERTAIN FIRED AIR TRAFFIC CONTROLLERS [Listed in Exhibit 1],

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1503

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, BALDWIN, BENNETT, SMITH, NIES, NEWMAN, BISSELL, and ARCHER, Circuit Judges.

ORDER

Petitioner, by his attorney Richard J. Leighton, having moved on January 10, 1986, for in banc review of denial by the Chief Judge on December 17, 1985, of Petitioners'

Appendix A

[second title above] "Motion to Prevent the Appearance and the Fact of Presentation of Particular Cases to Particular Judges and to Gain Court Compliance with its Own Procedures," filed December 5, 1985, "Exhibit 1" in the heading of the original motion being a listing of 120 appeals to this court by "fired air traffic controllers" allegedly represented by said Richard J. Leighton; and

Petitioner having moved on January 21, 1986, for "oral hearing" by the court in banc "except for the Chief Judge," who denied the original motion aforesaid; and

The court, in banc, having considered all the papers in Petitioner's original motion and his motion for review in banc and his motion for oral argument on the motions; and

Appendix A

The court having unanimously determined that said motions amount to no more than a request that the court, in its future consideration of appeals brought to this court by the aforesaid Richard J. Leighton as an attorney for Petitioner White and for other appellants shall conduct said appeals in accordance with the statutory law, the Federal Rules of Appellate Procedure, and the Rules of the United States Court of Appeals for the Federal Circuit insofar as they govern procedure in this court; and

The motion not having challenged nor sought relief with respect to any action this court has taken against the petitioner or any other individuals represented by the petitioner's attorney, but having sought an advisory opinion regarding the procedure this court may

follow in dealing with such cases, the court having no authority to render advisory opinions,

NOW THEREFORE, IT IS ORDERED THAT:

1. The request for review of the denial of the motion in banc is granted;

2. The requests for oral argument of the motion and for exclusion of the Chief Judge are denied; and

3. The original motion of December 5, 1985 is denied in banc.

FOR THE COURT IN BANC

2/7/86
Date

(s) Francis X. Gindhart
Clerk